In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

NO. 77-881

FRANK F. FASI, Mayor, City and County of Honolulu, FRANCIS A. KEALA, Chief of Police, Honolulu Police Department, City and County of Honolulu, and FRANCIS K. MATSUMOTO, Major, Honolulu Police Department, City and County of Honolulu,

Petitioners,

vs.

JAMES KAALAUKOA POKINI, aka James Akina, aka Poki,

Respondent.

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

1. **RESPONDENT DOES NOT DISPUTE THE IMPORTANT AND SUBSTANTIAL CONSTITUTIONAL ISSUES INVOLVED IN THE PRESENT PETITION — THE RETROACTIVE APPLICATION OF ATTORNEY'S FEES DEPRIVES PETITIONERS OF THEIR RIGHTS TO DUE PROCESS UNDER THE CONSTITUTION BY IMPOSING UPON THEM A SEVERE PENALTY WITHOUT ANY OPPORTUNITY TO DEFEND AGAINST IT.**

Nowhere in his "Response in Opposition to Petition For a Writ of Certiorari" does Respondent dispute the position taken earlier by Petitioners that substantial constitutional questions are presented in the present Petition. On page 2 Respondent states that the first three reasons argued by Petitioners "have no place in the aforesaid petition." That argument by Respondent is grounded upon the fact that not until after oral argument before the Ninth Circuit Court of Appeals did Petitioners have any opportunity to present an argument in writing opposing the applicability of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Sec. 1988. Petitioners sought to do this through the only avenue available to them, and then sought to raise the arguments formally in the petition for rehearing.

Respondent's assertion that these arguments have no basis demonstrates the outrageous position in which Petitioners have found themselves, in which attorney's fees have been assessed against them when they have had no opportunity to contest these fees. Thus, as argued on page 5 of Petitioners' Petition, this conduct by the courts has deprived Petitioners of the due process of law guaranteed them under the Constitution.

2. **THE LEGISLATIVE HISTORY OF 42 U.S.C. SEC. 1988 SHOULD NOT BE RELIED UPON IN DETERMINING WHETHER THAT SECTION IS APPLICABLE TO THE INSTANT SUIT.**

Petitioners assert that "manifest injustice" would occur if

attorney's fees were assessed in the instant suit, and thus the retroactive application of 42 U.S.C. Sec. 1988 would be improper under *Bradley v. Richmond School Board*, 416 U.S. 696 (1973). To argue, as does Respondent, that the imposition of personal liability on individuals who have engaged in no wrongdoing is *not* manifestly injust is to argue that Congress may be fiat impose any sort of penalty upon individuals who have not engaged in any wrongdoing, regardless of the nature of that penalty. The awarding of attorney's fees under these circumstances is as much a penalty as the awarding of punitive damages.

A perusal of the authority relied upon by Respondent in his assertions that retroactive application is proper demonstrates both the tortured posturing that must occur in order to sustain such a position, and also the internal inconsistency of his arguments. *Rosado v. Santiago*, 562 F.2d 114 (1st Cir. 1977), relied for its determination of retroactive application on *Martinez Rodrigues v. Jiminez*, 551 F.2d 877 (1st Cir. 1977), which relied for its determination of retroactive application on *Hutto v. Finney*, 548 F.2d 740 (8th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3261 (S.Ct. No. 76-1660, Oct. 18, 1977), and *Bradley v. Richmond School Board*, *supra*. The *Hutto* case recently has been argued before this Court and is now awaiting decision. 46 U.S.L.W. 3535 (Feb. 28, 1978). The *Bradley* decision does not provide support for the retroactive application of the award of attorney's fees for the reasons discussed in Petitioners' Petition and elsewhere in this Reply Memorandum. Each of the other five cases cited on page 4 of Respondent's Response also relies on the *Hutto* decision; or on *Bradley*; or on a case that relies on *Hutto* or *Bradley*; and the legislative history of 42 U.S.C. Sec. 1988.

Regardless of the facial validity of a law, the legislative history cannot validate an otherwise unconstitutional or illegal provision, or the illegal, improper and unconstitutional application of any given law that results in a substantive change in the rights of litigants, such as has occurred here in the retroactive application of attorney's fees. As this Court stated in another context in *Dobbert v. Florida*, 432 U.S. 232 (1977):

> '[T]he constitutional provision [against passage of *ex post facto* laws] was intended to secure substantial personal rights against arbitrary and oppressive legislation . . . and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'
> [432 U.S. at ____; 53 L.Ed.2d at 356.]

Further, in *Procunier v. Navarette*, S. Ct. No. 76-446 (S.Ct., Feb. 22, 1978), 46 U.S.L.W. 4144 (Feb. 21, 1978), this Court ruled that prison officials were entitled to a qualified immunity of the type outlined in *Wood v. Strickland*, 420 U.S. 308 (1975), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Even in dissent, the Chief Justice stated that:

> [O]ne who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under Sec. 1983. [46 U.S.L.W. at 4148 (Feb. 21, 1978).]

In the instant suit, not only was 42 U.S.C. Sec. 1988 passed after Petitioners were alleged to have acted improperly, but Petitioners were not even permitted to demonstrate that because of their good faith conduct they would not be liable for damages. This is particularly true for Petitioners Fasi and Keala who had no direct contact with the jail in question, and the record is void of any showing that either had any knowledge whatsoever of the operation of the jail.

3. THE ACT AS APPLIED TO LOCAL MUNICIPALITIES IS UNCONSTITUTIONAL.

The cryptic argument posed by Respondent, on page 5 of his Response, demonstrates the paradoxical nature of the retroactive application of 42 U.S.C. Sec. 1988 in this case. The legislative history quoted there demonstrates the complete lack of understanding by Congress of the relevant law in passing 42 U.S.C. Sec. 1988. This Court is well aware that under its holdings, municipalities cannot be sued under 42 U.S.C. Sec. 1983, the provision under which Respondent initially brought this action. Thus no costs whatsoever may be assessed municipalities under that provision, and to permit the collection of attorney's fees from Petitioners simply because of their

official positions allows Respondent to thwart the earlier holdings of this Court *sub silentio*.

4. CERTIORARI SHOULD BE GRANTED SINCE THE AUTHORITY UPON WHICH THIS CASE WAS DECIDED HAS BEEN DRAWN INTO QUESTION.

The case relied upon by the Ninth Circuit in ruling against Petitioners, *Stanford Daily v. Zurcher*, 550 F.2d 464 (9th Cir. 1977), *cert. granted*, 76-1484, 76-1600, 46 U.S.L.W. 3182, 3183 (Oct. 3, 1977), has been argued before this Court on January 17, 1978. 46 U.S.L.W. 3468 (Jan. 24, 1978). Moreover, *Hutto v. Finney*, *supra*, which was relied upon by other lower courts for the retroactive award of attorney's fees, also has been argued before this Court, as noted, *supra*. The incongruity posed by Respondent in asking this Court not to review the instant decision when the authority for that decision already is under review by this Court cannot be surpassed. Review is necessary in order to prevent any further injustice to Petitioners.

CONCLUSION

For the foregoing reasons and authority, the Petition for Writ of Certiorari should be granted.

DATED at Honolulu, Hawaii: March 9, 1978.

Respectfully submitted,

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